No. 235. 40

Brief of Atty. Gen'l (Richards, Pope & Bonsall) for U.S. on mo

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

MARIANO F. SENA, APPELLANT,
v.
THE UNITED STATES ET AL. } No. 235.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO TAKE ADDITIONAL TESTIMONY.

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The motion of appellant to take additional testimony in this cause is based upon the provision of the ninth section of the act creating the Court of Private Land Claims, which is quoted on page 11 of appellant's motion.

This provision was considered by this court in the *United States* v. *Coe* (155 U. S., 79, 83), where the court after holding that in equity causes and independent of statute it is within the power of the court to allow the taking of additional testimony on appeal, says:

> Nevertheless, orders allowing this to be done are not granted as a matter of course, but are made with extreme caution, and only on satisfactory grounds.

The motion of the claimant is directed to two ends: *First*, the admission of the will of Simon de Leyba

recently found in the archives at Santa Fe and a translation of which appears as a part of claimant's motion; and, *second*, the admission of the oral testimony of Inez Apodaca and Felipe Pino, affidavits in respect to whose testimony appears in the record, and "possibly of other witnesses" (p. 14).

So far as the will is concerned, it is admitted for the purposes of this motion that said document appears among the files known as "the old Spanish archives" in the custody of the Territorial librarian at Santa Fe. As such it is presumptively genuine, and under the holdings of this court in some of the California cases is a document which this court may consider on this appeal, whether formally tendered in the court below or not. There is, therefore, no objection on the part of the Government to the consideration of this document as a part of the record in the cause. The correctness of the translation tendered, as well as the relevancy, force, and effect of the instrument itself, are matters more properly for discussion on the hearing of the merits, when it is believed that it can be demonstrated to the court that the document is lacking in any controlling, or indeed serious, influence upon the result which should attend this appeal.

The application to take the further oral testimony of the two witnesses named and "possibly of other witnesses" is in effect a motion for a rehearing of the whole cause, since it is manifest that if claimants are to be allowed to bring in oral proof to supplement their original case the order allowing such application should

extend the Government the same privilege, resulting practically in a new record. The application is, therefore, putting it most favorably, to be tested by the rules governing motions for rehearings or for new trials, and when so tested it is not believed that this court, in the exercise of "extreme caution," will find the "satisfactory grounds" prescribed by the Coe case as justifying a retrial. The familiar rules governing the granting of new trials for newly discovered evidence require, among other things, (1) that the proposed testimony must be such as could not, by the exercise of due diligence, have been discovered before the trial. It is not believed that the proposed tender brings this case within the requirement of this rule. The parties to this cause must recover upon their claim, if at all, upon the theory that it was a perfect and complete title at the date of the treaty of 1848. It would seem that the holder of such a title would, after forty years ownership under the American Government, have been prepared in 1891, when the Court of Private Land Claims was established, to present his claim for adjudication; but in this case the grant was withheld from presentation to the court for eight years longer. It would at least seem that in 1899, when suit was finally filed, the parties at interest should have been prepared to present all the proofs available for its support. Still some months intervened to the trial, during which time claimants had the opportunity to secure the testimony deemed necessary, and finally, in 1900, the cause was tried and submitted. It is not

believed that there are any facts developed by the affidavits excusing his failure to secure this testimony during the ample time prior to the trial. (2) Upon the showing made in at least the affidavit as to the witness Inez Apodaca, it is not made reasonably to appear that were the case reopened the witness would testify as stated. The general rule, of course, is that the affidavit of the newly discovered witness must be presented, or when for satisfactory cause such affidavit can not be obtained, then an equivalent showing must be made. The affidavit of the proposed witness is not produced, neither is the affidavit of any person who has talked with the witness produced. All that is produced is an affidavit from the claimant Sena that another party had told him that the proposed witness would testity as outlined, which is hearsay twice over. (3) To justify a new trial the evidence must be such as will probably change the result. It requires but a reading of the affidavits of Sena and Pino to show that most, if not all, of what they *might* testify to if sworn is clearly inadmissible as evidence, both because it is hearsay and upon other obvious grounds. (4) The proposed testimony, viewing it as admissible and in its strongest light, is purely cumulative.

It is respectfully submitted, therefore, that the showing now made, when considered in connection with the unanimous opinion of the court below determining this cause, fails to justify a reopening for the admission of the testimony now tendered. If, however, further oral proof is to be received it is respectfully urged that

the order remanding the case for this purpose should afford the Government full opportunity to present testimony in rebuttal of what claimant may produce

Respectfully submitted.

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